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Vasanthi a/p Rajamanikam v Kalaiselvi a/p Perumal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-404–02 OF 2012
LOW HOP BING, ZAHARAH IBRAHIM AND AZIAH ALI JJCA
15 MAY 2012

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Civil Procedure — Affidavits — Affidavit in support — Appellant's affidavit in support pertaining to written confession and settlement agreement — Respondent filed affidavit in reply out of time — Respondent subsequently abandoned her application for extension of time to admit affidavit — Whether appellant's assertion deemed admitted by respondent

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Civil Procedure — Admission — Judgment on admission of facts — Admission contained in written confession and settlement agreement — Whether admission of facts fell within ambit of O 27 r 3 of the Rules of the High Court 1980 — Respondent executed written confession and settlement agreement before writ of summons filed — Whether court can consider and decide on admission made before

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commencement of any legal proceeding — Whether trial judge erred in law and in fact in holding that respondent was under duress, undue influence and coercion when contemporaneous documents viz written confession and settlement agreement showed otherwise — Whether High Court correct in dismissing appellant's application for judgment — Rules of the High Court 1980 O 27 r 3

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This was an appeal by the appellant against the decision of the High Court in dismissing the appellant's application against the respondent under O 27 r 3 of the Rules of the High Court 1980 ('RHC') for a sum of RM1.2m, being the money allegedly misappropriated by the respondent who was at the material

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time employed by appellant as a clerk in appellant's law firm. The appellant had sought judgment in the above sum based on the respondent's admissions contained in the written confession and settlement agreement. The appellant submitted that there were merits in the appellant's application under O 27 r 3 for the following reasons: (a) the respondent's affidavit in reply had been rightly

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rejected by the High Court as it was filed out of time without any appropriate reason; and (b) the respondent had abandoned her application for extension of time to file the said affidavit in reply. Hence, the following question was raised for the determination of this court: 'in view of the respondent's admissions as contained in the written confession and the settlement agreement, was the

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High Court correct in dismissing appellant's application for judgment in the sum of RM1.2m against the respondent pursuant to O 27 r 3 of the RHC.'

Held, allowing the appeal with costs:

(1) Order 27 r 3 of the RHC empowers the High Court to enter a judgment

or order upon a party's admission. In the instant appeal, both the written confession and settlement agreement were executed by the respondent before the writ of summons was filed. The court can certainly consider and decide on the admission made before any legal proceeding has been commenced (see paras 13–14).

(2) The respondent's resistance to the appellant's application for judgment under O 27 r 3 had been further weakened. The respondent's own affidavit in reply was filed out of time. The respondent had subsequently abandoned her application for extension of time to admit the affidavit, as a result of which, the respondent's said affidavit was not admitted at the hearing of appellant's application under O 27 r 3. In the circumstances, the appellant's affidavit in support pertaining to the written confession and settlement agreement remained unchallenged. The appellant's assertion was therefore deemed to have been admitted by the respondent. It was abundantly clear that the admissions of fact, contained in the written confession and the settlement agreement, came within the ambit of O 27 r 3 (see para 15).

(3) The trial judge had erred in law and in fact in holding that the respondent was under duress, undue influence and coercion when the contemporaneous documents viz the written confession and the settlement agreement showed otherwise (see para 16).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi dalam menolak permohonan perayu terhadap responden di bawah A 27 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk sejumlah RM1.2 juta, sebagai wang yang didakwa disalahgunakan oleh responden yang pada masa material diambil bekerja oleh perayu sebagai kerani firma undang-undang perayu. Perayu telah memohon penghakiman dalam jumlah di atas berdasarkan pengakuan responden yang terkandung di dalam pengakuan bertulis dan perjanjian penyelesaian. Perayu berhujah bahawa terdapat merit di dalam permohonan perayu di bawah A 27 k 3 untuk alasan-alasan berikut: (a) afidavit jawapan responden telah ditolak dengan betul oleh Mahkamah Tinggi kerana ia difailkan di luar masa tanpa alasan-alasan yang wajar; dan (b) responden telah membatalkan permohonannya untuk pelanjutan masa untuk memfailkan afidavit jawapan tersebut. Maka, persoalan berikut dibangkitkan untuk penentuan mahkamah ini: 'mengambil kira pengakuan responden seperti yang terkandung di dalam pengakuan bertulis dan perjanjian penyelesaian, adakah Mahkamah Tinggi betul dalam menolak permohonan perayu untuk penghakiman dalam jumlah RM1.2 juta terhadap responden berikutan A 27 k 3 KMT.'

Diputuskan, menolak rayuan dengan kos:

(1) Aturan 27 k 3 KMT memberi kuasa kepada Mahkamah Tinggi untuk

memasukkan penghakiman atau perintah ke atas pengakuan pihak. Dalam rayuan ini, kedua-dua pengakuan bertulis dan perjanjian penyelesaian dilaksanakan oleh responden sebelum writ saman difailkan. Mahkamah sememangnya mempertimbangkan dan memutuskan atas pengakuan yang dibuat sebelum apa-apa prosiding undang-undang bermula (lihat perenggan 13–14).

(2) Tentangan responden kepada permohonan perayu untuk penghakiman di bawah A 27 k 3 telah dilemahkan selanjutnya. Afidavit jawapan responden sendiri difailkan di luar masa. Responden kemudiannya telah membatalkan permohonannya untuk pelanjutan masa untuk memasukkan afidavit, akibatnya, afidavit responden tersebut tidak dimasukkan pada pendengaran permohonan perayu di bawah A 27 k 3. Dalam keadaan ini, afidavit sokongan perayu berkaitan pengakuan bertulis dan perjanjian penyelesaian kekal tidak dicabar. Penegasan perayu oleh itu dianggap telah dimasukkan oleh responden. Adalah jelas sekali bahawa pengakuan fakta, terkandung di dalam pengakuan bertulis dan perjanjian penyelesaian, terangkum dalam skop A 27 k 3 (lihat perenggan 15).

(3) Hakim perbicaraan telah tersilap dari segi undang-undang dan fakta dalam memutuskan bahawa responden di bawah dures, pengaruh tak wajar dan pemaksaan apabila dokumen-dokumen semasa pengakuan bertulis dan perjanjian penyelesaian menunjukkan sebaliknya (lihat perenggan 16).]

Cases referred to

Aetna Universal Insurance Sdn Bhd v Fire Accident & Marine Sdn Bhd [2001] MLJU 480; [2001] 4 CLJ 753, HC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Pembinaan KSY Sdn Bhd v Syarikat Federal Furniture Construction and Engineering Works [1991] 1 MLJ 347; [1991] 1 CLJ (Rep) 346, SC (refd)
Tom Manas Enterprise Sdn Bhd v Soh Ah Wah [1995] 3 CLJ 610, HC (refd)
Vithal Kumar a/l Jayaraman v Azman bin Md Nor [2010] 2 MLJ 67, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 27 r 3

Appeal from: Civil Suit No S-22–281 of 2010 (High Court, Kuala Lumpur)

Low Eu Thuan (Cheong Wai Meng & Van Buerle) for the appellant.
Ramesh Sivakumar (Ramesh & Loo) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This appeal filed by the appellant ('the first defendant') is directed against

the decision of the learned High Court judge who had dismissed the first defendant's summons in chambers praying that judgment be entered under O 27 r 3 of the Rules of the High Court 1980 (O 27 r 3) against the respondent ('the plaintiff') for RM1,200,000, being part of the first defendant's counterclaim against the plaintiff.

FACTUAL BACKGROUND

[2] The first defendant's counterclaim against the plaintiff was for, inter alia, a sum of RM2,219,126.24 being money allegedly misappropriated by the plaintiff who was at the material time employed by the first defendant as a clerk in the first defendant's law firm ('the law firm').

[3] The first defendant's summons in chambers sought judgment in the sum of RM1,200,000 based on the plaintiff's admissions contained in the written confession and settlement agreement, both dated 29 December 2009.

[4] The plaintiff's duties included, inter alia, handling the accounts, issuance of cheques and liaising with banks for balances in the law firm.

[5] On 27 December 2009, the first defendant discovered that the plaintiff had tampered with Cheque No 748065 dated 24 December 2009 for RM3,150 by amending the amount to RM13,150. The plaintiff had also not deposited cash amounting to RM6,800 into the law firm's bank account.

[6] When the first defendant conducted an investigation, the plaintiff confessed to the first defendant that she (the plaintiff) had misappropriated the law firm's funds beginning from 2006.

[7] On 29 December 2009, the plaintiff in her own handwriting and on her own accord confessed, voluntarily and freely, without any duress, undue influence or coercion, that she had issued cheques in her own name and banked into her own savings account ie CIMB No 14030224563529. Some RM600,000–RM800,000 had been taken by her to pay for her car instalments, house loan, jewellery, vacation, credit cards etc.

[8] The plaintiff also executed the settlement agreement which was prepared by solicitors Chanthiran & Co, in which she admitted she had committed criminal breach of trust and fraud (collectively, the fraudulent acts) on the first defendant. The settlement agreement was witnessed by Commissioner for Oaths Hariramas Palaya and accountant Gamini Rodrigo. The fraudulent acts had been committed by her over a period of five years viz from 2005–2009 by transferring or causing to transfer monies belonging to the law firm to the

plaintiff's CIMB account. The plaintiff admitted that by her own fraudulent acts, she had unjustly and unlawfully enriched herself and was now desirous of repaying the amount which she had obtained as a result of her fraudulent acts. The total outstanding sum due and owing by the plaintiff to the first defendant as at 29 December 2009 was RM1,200,000 which the plaintiff agreed to repay by:

(a) signing a power of attorney in favour of the first defendant to sell, rent and/or deal with the plaintiff's properties, including a Toyota Camry car bearing Registration No WQK 2666;

(b) returning all monies deposited in the plaintiff's bank accounts;

(c) returning all jewellery and personal items purchased by means of the plaintiffs ill-gotten gains; and

(d) paying a sum of RM5,000 per month by the seventh day of each month commencing January 2010–December 2013.

MERITS OF THE FIRST DEFENDANT'S APPLICATION UNDER O 27 R 3

[9] The first defendant's learned counsel Mr Low Eu Thuan submitted that there are merits in the first defendant's application under O 27 r 3 as the plaintiff's affidavit in reply has been rightly rejected by the learned High Court judge, as it was filed out of time without any appropriate reason and the plaintiff has abandoned her application for extension of time to file the said affidavit in reply.

[10] Learned counsel Mr Ramesh Sivakumar responded for the plaintiff that O 27 r 3 would only apply if the plaintiff's admission is unequivocal, clear and positive, but it is not the case in the instant appeal.

[11] The question which we must address herein is:

> In view of the admissions contained in the plaintiff's written confession and the settlement agreement executed between the plaintiff and defendant 1, was the learned judge of the High Court correct in dismissing defendant 1's application for judgment in the sum of RM1,200,000 against the plaintiff pursuant to O 27 r 3?

[12] Order 27 r 3 provides as follows:

> Judgment on admission of facts (O 27 r 3)
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> Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, without

waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this may be made by summons.

[13] In our view, O 27 r 3 empowers the High Court to enter a judgment or order upon a party's admission. Hence, in *Pembinaan KSY Sdn Bhd v Syarikat Federal Furniture Construction and Engineering Works* [1991] 1 MLJ 347; [1991] 1 CLJ (Rep) 346, Ajaib Singh SCJ, speaking for the (then) Supreme Court, affirmed the decision of the High Court which had allowed the plaintiff's application based on a letter of admission of the plaintiff's claim pursuant to Certificates No 29–31 for progress payments under a subcontract. This decision was followed by:

(a) the High Court in *Aetna Universal Insurance Sdn Bhd v Fire Accident & Marine Sdn Bhd* [2001] MLJU 480; [2001] 4 CLJ 753, at p 76 g–h; passage at pp 1276 and 1277 of the Malaysian Court Practice; and

(b) the Court of Appeal in *Vithal Kumar a/l Jayaraman v Azman bin Md Nor* [2010] 2 MLJ 67 at pp 72–73, which also approved my judgment delivered in the High Court in *Tom Manas Enterprise Sdn Bhd v Soh Ah Wah* [1995] 3 CLJ 610 (HC). Ramly Ali JCA who delivered the judgment of the Court of Appeal stressed that:

> In determining the issue, the court has to consider the circumstances of the case, particularly when and how the monies were given by the plaintiff to the first defendant. Relevant documents must be considered. These documents' may have been in existence before the action was commenced in court. As clearly held by Low Hop Bing J in *Tom Monies (sic) Enterprise Sdn Bhd*, there is abundant authority to support the proposition that the court can consider and decide on the admission made before any legal proceedings have been commenced.

[14] In the instant appeal, both the written confession and settlement agreement were executed by the plaintiff on 29 December 2009 before the writ of summons was filed in March 2010. The court can certainly consider and decide on the admission made before any legal proceeding have been commenced: *Vithal Kumar a/l Jayaraman v Azman bin Md Nor*.

[15] Next, the plaintiff's resistance to the first defendant's application for judgment under O 27 r 3 had been further weakened. The plaintiff's own affidavit in reply was filed out of time. The plaintiff had subsequently abandoned her application for extension of time to admit the affidavit, as a result of which, the plaintiff's said affidavit was not admitted at the hearing of the first defendant's application under O 27 r 3. In the circumstances, the first defendant's affidavit in support pertaining to the written confession and settlement agreement remains unchallenged. The first defendant's assertion

therein is therefore deemed to have been admitted by the plaintiff: *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA). It is abundantly clear that the admissions of fact, contained in the written confession and the settlement agreement, come within the ambit of O 27 r 3.

[16] The learned High Court judge has erred in law and in fact in holding that the plaintiff was under duress, undue influence and coercion when the contemporaneous documents viz the written confession and the settlement agreement show otherwise.

CONCLUSION

[17] With the utmost respect, we are of the view that the learned judge has erred in dismissing the first defendant's application. Hence, our answer to the above question is in the negative.

[18] We therefore allow this appeal, set aside the order of the High Court and substitute it with an order that judgment be entered under O 27 r 3 for the first defendant against the plaintiff in the sum of RM1,200,000 with interest and costs of RM15,000 here and in the court below. Deposit to be refunded to the first defendant (the appellant).

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed